No. 92-1254

Supreme Court, U.S.
FILED
JAN 19 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1992

CHARLES N. REED,

Petitioner,

vs.

PHILADELPHIA, BETHLEHEM & NEW ENGLAND RAILROAD,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

MARVIN I. BARISH
Attorney for Petitioner
Suite 801, The Curtis Center
Sixth & Walnut Streets
Philadelphia, Pennsylvania 19106
(215) 923-8900

3108
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

QUESTIONS PRESENTED FOR REVIEW

1. Whether in an action under the Federal Safety Appliance Act evidence that a safety appliance functioned after the injury was a defense to petitioner's claim that it was inoperative at the time of his injury, and whether the prevailing rule that a failure of cars to couple upon impact is a violation of the FSAA has been altered as to afford a defense of misalignment when the railroad failed to establish that misalignment was not due to a failure or defect in the equipment.

2. Whether the jury's general finding that the Safety Appliance Act had been violated in a case submitted on two distinct theories should have been sustained where the appeals court found one of the theories tainted by reversible error, but the other free of error, and where the jury could not have found liability without finding for the injured party on the non-tainted theory and where the railroad took no exception to the court's instruction or to the form of verdict which invited the jury to find as it did, and whether reversal of the verdict under these circumstances violated petitioner's Seventh Amendment right to trial by jury.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Table of Contents	ii
Table of Citations	iii
Opinions Below	1
Statement of Jurisdiction	2
Constitutional and Statutory Provisions Involved	2
Statement of the Case	3
Reasons for Granting the Writ	6
I. The decision below that evidence that a safety appliance functioned after an injury is a defense to the claim that the safety appliance was inoperative at the time of the injury is in direct conflict with the uniform opinions of this Court on this issue.	6
II. The decision below that drawbar misalignment is a defense to an action under the Federal Safety Appliance Act is in violation of the uniform decisions of this Court and creates a substantial conflict with contrary opinions of other Circuit Courts of Appeals deciding this issue.	8

Contents

Page

III. Granting a new trial because of alleged error on one theory of liability when there was no error on a totally different theory of liability that alone sustained the verdict, violated petitioner's Seventh Amendment right to trial by jury. 13

Conclusion 17

TABLE OF CITATIONS

Cases Cited:

Affolder v. N.Y., C. & St. Louis R. R. Co., 339 U.S. 96, 94 L. Ed. 683 (1950) 6, 7, 9

Atlantic City R. Co. v. Parker, 242 U.S. 56 (1916) 9, 11

Bogosian v. Gulf Oil Corp., 561 F.2d 434 (3d Cir. 1977), cert. denied, 434 U.S. 1086 (1978) 13

Carter v. Atlantic & St. A.B.B. Co., 338 U.S. 433 (1949) 7, 9

Chicago St. Paul Minneapolis & Omaha Ry. Co. v. Muldowney, 130 F.2d 971 (1942) 9

Clark v. Kentucky & Indiana Terminal R.R., 728 F.2d 307 (6th Cir. 1984) 9, 11

Cobb v. Union Ry. Co., 318 F.2d 33 (6th Cir. 1963) 9

Coleman v. Burlington Northern Inc., 681 F.2d 542 (8th Cir. 1982) 9

Contents

Page

Eckert v. Aliquippa & So. R. Co., 828 F.2d 183 (3d Cir. 1987) 8

Field v. Omaha Standard Indus. Inc., 582 F. Supp. 323 (E.D. Pa. 1983), aff'd, 723 F.2d 145 (3d Cir. 1984) ... 13

Gallick v. Baltimore & Ohio R. Co., 372 U.S. 108 (1963) 14

Geraghty v. Lehigh Valley R. Co., 70 F.2d 300 (2d Cir. 1939) 10

Hallada v. Great Northern Ry., 244 Minn. 81, 69 N.W. 2d 673, cert. denied, 350 U.S. 874 (1955) 9

Hampton v. Des Moines & Cent. Ohio R.R. Co., 65 F.2d 899 (8th Cir. 1933) 9

Henry v. A/S Ocean, 512 F.2d 880 (2d Cir. 1948) 14

Kansas City S.R. Co. v. Coyle, 229 F.2d 12 (10th Cir. 1955) 10

Lewis v. Baker, 526 F.2d 470 (2d Cir. 1975) 8

Lind v. Schenley Industries, Inc., 278 F.2d 79 (3d Cir. 1960), cert. denied, 364 U.S. 835 (1960) 13, 14

Lopez v. Oldendorf, 545 F.2d 836 (2d Cir. 1976), cert. denied, 431 F.2d 988 (1977) 16

Contents

Page

Maldonado v. Missouri Pacific Ry. Co., 798 F.2d 764 (5th Cir. 1986) 9, 10, 11, 12

Metcalfe v. Atkinson Topeka & Santa Fe Ry. Co., 491 F.2d 892 (10th Cir. 1974) 9, 10

Morgan v. Consolidated Rail Corp., 509 F. Supp. 281 (S.D.N.Y. 1980) 14, 16

Myers v. Reading Co., 331 U.S. 477 (1947) 6

O'Donnell v. E.J. & E. R. Co., 338 U.S. 384 (1949) 8, 9

Pearce v. Cornerstone Clinic for Women, 938 F.2d 855 (8th Cir. 1991) 13

Rubin v. United States, 380 F. Supp. 1176 (W.D. Pa. 1974), aff'd mem., 515 F.2d 507 (3d Cir. 1975) 16

San Antonio & Arkansas Pass. Ry. Co. v. Wagner, 241 U.S. 476 (1916) 9

Schaaf v. Chesapeake & Ohio Ry., 113 Mich. App. 544, 317 N.W. 2d 679, cert. denied, 464 U.S. 848 (1983) 9

Sentilles v. Inter-Caribbean Shipping Corp., 361 U.S. 107, 4 L. Ed. 2d 142 (1959) 15

Smith v. Danyo, 585 F.2d 83 (3d Cir. 1978) 13

White v. Atchison, Topeka & Santa Fe Ry. Co., 244 S.W. 2d 26 (Mo. 1951), cert. denied, 343 U.S. 915 (1952) 9

Contents

Page

Statutes Cited:

28 U.S.C. § 1254(1) 2

45 U.S.C. § 1 et seq. 4

45 U.S.C. § 2 .....i, 1, 2, 8, 9, 10

45 U.S.C. § 51 4

United States Constitution Cited:

Seventh Amendment .....i, 2, 13, 14

APPENDIX

Appendix A – Sur Petition for Rehearing of the United States Court of Appeals for the Third Circuit Dated November 18, 1992 ..... 1a

Appendix B – Opinion of the United States Court of Appeals for the Third Circuit Filed October 29, 1992 .. 3a

Appendix C – Judgment of the United States Court of Appeals for the Third Circuit Dated October 19, 1992 . 12a

Appendix D – Memorandum Opinion and Order of the United States District Court for the Eastern District of Pennsylvania Filed January 22, 1992 ..... 14a

No.

In The

Supreme Court of the United States

October Term, 1992

CHARLES N. REED,

Petitioner,

vs.

PHILADELPHIA, BETHLEHEM & NEW ENGLAND RAILROAD,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

The petitioner, Charles Reed, petitions this Court for a writ of certiorari to review a judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on October 19, 1992.

OPINIONS BELOW

The Judgment of the United States District Court for the Eastern District of Pennsylvania was entered January 23, 1992,

and is reported in the Appendix to this petition (App. at 14a). The Judgment of the Third Circuit Court of Appeals was entered October 19, 1992, and is reproduced in the Appendix to this petition (App. at 12a). The Order of November 18, 1992 denying rehearing is contained in the Appendix to this petition (App. at 1a).

STATEMENT OF JURISDICTION

The District Court entered its judgment on January 23, 1992. The Court of Appeals entered its judgment on October 19, 1992. The Order denying rehearing was filed November 18, 1992.

This Court's jurisdiction is invoked under Title 28, United States Code, § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Seventh Amendment to the Constitution of the United States:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

2. 45 U.S.C. § 2:

> On and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car

used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.

STATEMENT OF THE CASE

Charles Reed, petitioner, a freight conductor employed by respondent, Philadelphia, Bethlehem & New England Railroad ("PBNE") suffered an amputation of the front of his right foot in the course of his employment. On the day of the accident, Reed and his crew were assigned the task of weighing scrap cars. To accomplish this, the workers were to "cut" or uncouple each car and allow it to pass across an automatic scale on the tracks. The cars then travelled down a straight-away where they were to automatically couple (reconnect) at a point beyond the scale.

Reed uncoupled the first car, a box car, from the rest of the train. He climbed aboard and rode it down the scale. After he applied the brakes to the boxcar, he signaled the crew to uncouple the next car, a scrap car. The scrap car passed over the scale and came into contact with the boxcar, but failed to couple with it on impact. Reed then attempted to open the knuckle on the scrap car by using a lever located on the outer edge of the car known as a cutting lever. The cutting lever is connected to the pin of the coupler and permits the coupler to be opened by lifting the cutting lever which in turn lifts the pin. The handle of the cutting lever is placed outside the side of the scrap car so that the pin of the coupler can be lifted and the coupler opened without requiring the worker to go between the car in order to open the coupler. Because the cutting lever was defective, Reed was forced to go between the two cars to open the coupler to permit the cars to couple. While so engaged, the scrap car lurched forward, amputating the front

portion of his right foot. Immediately afterwards, railroad inspectors examined the cutting lever and confirmed it was defective.

Reed instituted suit in the United States District Court for the Eastern District of Pennsylvania under the Federal Employer's Liability Act as supplemented by the Federal Safety Appliance Act, 45 U.S.C. § 1 *et seq.* (FSAA). The case was submitted to the jury, however, under the FSAA. Petitioner asserted two distinct violations of that Act: (1) the failure of the cars to couple on a straightaway, and (2) the defective cutting lever that caused Reed to go between the cars to open the knuckle of the coupler so that the cars would couple upon the next impact.

Trial lasted four days. Twelve witnesses were called. No witness disputed the fact that the cutting lever was defective, nor was there any testimony that the failure of the cars to couple was not due to a failure in the equipment. In response to a specific interrogatory the jury found that the FSAA had been violated[1] and awarded $563,275.22 to petitioner.

---

1. 1. Do you find that the defendant violated section 2 of the Federal Safety Appliance Act? YES_x_ NO __ (If your answer to interrogatory number 1 is "YES", please proceed to interrogatory number 2. If your answer to interrogatory number 1 is "NO", you will be returning a verdict for defendant, and your deliberations are complete.)

2. Do you find that the defendant's violation of section 2 of the Federal Safety Appliance [sic] played any part, no matter how small, in bringing about or actually causing injury to the plaintiff? YES_x_ NO__ (If your answer to interrogatory number 2 is "YES", please

(Cont'd)

The Court of Appeals reversed. The court found no error in that portion of the case dealing with the defective cutting lever; however, the court concluded that the district judge committed error in that aspect of the case dealing with the failure of the cars to couple. Specifically, the district court ruled that defense counsel could not read to the jury a portion of a witness' testimony dealing with the witness' experiences with *other* instances of failure to couple due to misalignments caused by a jarring of a car in motion. The basis of the district court's ruling was that defense counsel, during his cross-examination of the witness, failed to read the portion to the jury that he was attempting to read in his closing. Additionally, the appellate court concluded the district judge erred when he refused to charge that evidence that a safety appliance functioned after an injury was a defense to a claim that the safety appliance was inoperative at the time of the injury. The court concluded "when a jury's finding may be based on one of two theories, one which is tainted by reversible error *and the other which is not*, the judgment must be set aside."

This writ seeks reinstatement of the jury verdict as the decision of the Court of Appeals directly conflicts with decisions of this Court and creates substantial conflict with contrary opinions of other Circuit Courts on this issue.

(Cont'd)

> proceed to interrogatory number 3. If your answer to interrogatory number 2 is "NO", you will be returning a verdict for defendant, and your deliberations are complete.)

REASON FOR GRANTING THE WRIT

I.

THE DECISION BELOW THAT EVIDENCE THAT A SAFETY APPLIANCE FUNCTIONED AFTER AN INJURY IS A DEFENSE TO THE CLAIM THAT THE SAFETY APPLIANCE WAS INOPERATIVE AT THE TIME OF THE INJURY IS IN DIRECT CONFLICT WITH THE UNIFORM OPINIONS OF THIS COURT ON THIS ISSUE.

In *Myers v. Reading Co.*, 331 U.S. 477, 483 (1947), the Supreme Court defined the scope of the FSAA as follows:

> Proof of an actual break or visible defect in a coupling appliance is not a prerequisite to a finding that the statute has been violated. Where a jury finds that there is a violation, it will be sustained, if there is proof that the mechanism failed to work efficiently and properly *even though it worked efficiently both before and after the occasion in question.* The test in fact is the performance of the appliance. *Phila. & R.R. Co. v. Auchenbach*, 3 Cir, 16 F.2d 550. Efficient means adequate in performance; producing properly a desired effect. Inefficient means not producing or not capable of producing the desired effect; incapable; incompetent; inadequate. (Emphasis added).

This concept was reinforced in *Affolder v. N.Y., C. & St. Louis R.R. Co.*, 339 U.S. 96, 94 L. Ed. 683 (1950):

> Nor do we think that any question regarding the

> normal efficiency of the couplers is involved in an action under the Safety Appliance Acts. As we said in *O'Donnell v. Elgin J. & E. R. Co.*, 338 U.S. 384, *ante*, 187, 70 S.Ct. 200 (1949) and the *Carter* case (U.S.) *supra*, the duty under the Acts is not based on the negligence of the carrier but is an absolute one requiring performance "*on the occasion in question.*"

339 U.S. 96 at 98 (emphasis added).

Carter v. Atlantic & St. A.B.B. Co., 338 U.S. 433 (1949) exemplifies this principle. In *Carter*, a railroad car, instead of coupling to the train to which it was to be attached, started rolling down the tracks when a train hit it in a manner normally necessary for coupling. The employee in charge ran after the car and stopped it. The engineer, assuming the car had coupled, continued to move the train until the train hit the car. This time coupling was successful, but the impact was so violent that some freight loaded in the car pitched forward injuring Carter. Defendant moved for a directed verdict on the ground that, while the coupler failed to couple on initial impact, "it worked previously and worked subsequently, and the proof showed no defect in it." In denying this contention, the Court stated at pp. 433-34:

> Since 1893 the Congress has made it unlawful for a railroad company such as respondent to use any car on its line "not equipped with couplers, coupling automatically by impact." This Court has repeatedly attempted to make clear that this is an absolute duty not based upon negligence, and that the absence of a "defect" cannot aid the railroad if the coupler was properly set and failed to couple on the occasion in question. See *O'Donnell v. Elgin*,

> *Joliet & Eastern R. Co.*, 338 U.S. 384, 390, *ante*, 187, 170 S.Ct. 200 (1949) and cases cited. The fact that the coupler functioned properly on other occasions is immaterial.

See also, O'Donnell v. E. J. & E. R. Co., 338 U.S. 384 (1949); *Eckert v. Aliquippa & So. R. Co.*, 828 F.2d 183 (3d Cir. 1987).

The Third Circuit's reliance on *Lewis v. Baker*, 526 F.2d 470, 474 (2d Cir. 1975) is inappropriate. *Lewis* combined the FELA case with the FSAA case. In that situation, evidence not admissible in a FSAA case can be relevant on the FELA claim. This situation, described in *O'Donnell, supra* at 391 as a "single mongrel cause of action" is not involved in the instant case where the action was prosecuted on the FSAA alone.

Further, respondent did not object to this charge. The court's attempt to circumvent this failure by relying on the District Court's blanket exception "to the extent that I overruled either of your requests" is of no avail as respondent did not submit a request for charge on this issue.

II.

THE DECISION BELOW THAT DRAWBAR MISALIGNMENT IS A DEFENSE TO AN ACTION UNDER THE FEDERAL SAFETY APPLIANCE ACT IS IN VIOLATION OF THE UNIFORM DECISIONS OF THIS COURT AND CREATES A SUBSTANTIAL CONFLICT WITH CONTRARY OPINIONS OF OTHER CIRCUIT COURTS OF APPEAL DECIDING THIS ISSUE.

Section 2 of the Federal Safety Appliance Act imposes absolute liability upon a railroad for injuries sustained when the automatic couplers fail to perform "on the occasion in question."

Affolder, supra, 339 U.S. 96 (1950); *Carter, supra*, 338 U.S. 430 (1949); *O'Donnell*, 338 U.S. 384 (1949); *Atlantic City R. Co. v. Parker*, 242 U.S. 56 (1916); *San Antonio & Arkansas Pass. Ry. Co. v. Wagner*, 241 U.S. 476 (1916); *Chicago St. Paul Minneapolis & Omaha Ry. Co. v. Muldowney*, 130 F.2d 971 (1942); *Clark v. Kentucky & Indiana Terminal R.R.*, 728 F.2d 307 (6th Cir. 1984); *Coleman v. Burlington Northern Inc.*, 681 F.2d 542 (8th Cir. 1982); *Cobb v. Union Ry. Co.*, 318 F.2d 33 (6th Cir. 1963). Therefore, neither the diligence of the railroad nor the absence of a specific defect in the coupler is relevant to a finding of liability. *O'Donnell*, 338 U.S. 384 (1949); *Coleman*, 681 F.2d 542 (8th Cir. 1982).

The requirement that a coupler be placed in position to operate has been uniformly interpreted as requiring the necessity of opening the knuckle on at least one of the couplers as coupling would be impossible if both knuckles were closed. *Affolder*, 339 U.S. 96 (1950); *Clark*, 728 F.2d 307, 312-313 (6th Cir. 1984); *Hallada v. Great Northern Ry.*, 244 Minn. 81, 69 N.W.2d 673, *cert. denied*, 350 U.S. 874 (1955); *White v. Atchison, Topeka & Santa Fe Ry. Co.*, 244 S.W.2d 26 (Mo. 1951), *cert. denied*, 343 U.S. 915 (1952); *Schaaf v. Chesapeake & Ohio Ry.*, 113 Mich.App. 544, 317 N.W.2d 679, *cert. denied*, 464 U.S. 848 (1983).

As proper equipment cannot move so far out of line as to prevent coupling, these decisions hold that misalignment, so great as to prevent coupling, is a violation of the Safety Appliance Act. *Clark*, 728 F.2d 307, 312-13 (6th Cir. 1984). The normal lateral play of a drawbar on a straightaway, such as the track in the case at bar, cannot prevent automatic coupling unless the drawbars are defective. *Parker*, 242 U.S. 56, 59 (1916); *Wagner*, 241 U.S. 476, 484 (1916); *Metcalfe v. Atkinson Topeka & Santa Fe Ry. Co.*, 491 F.2d 892 (10th Cir. 1974); *Clark*, 728 F.2d 307 (6th Cir. 1984); *Muldowney*, 130 F.2d 971, 974-75 (8th Cir. 1942); *Hampton v. Des Moines & Cent. Ohio R.R. Co.*, 65 F.2d 899 (8th Cir. 1933).

In *Kansas City S. R. Co. v. Coyle*, 229 F.2d 12, 14 (10th Cir. 1955) the court stated: "without exception the cases have held that operating a car on which the drawbar is so out of line as to prevent automatic coupling violates the Act and poses absolute liability." *See further, Metcalfe*, 491 F.2d 892 (10th Cir. 1974); *Geraghty v. Lehigh Valley R. Co.*, 70 F.2d 300 (2d Cir. 1939).

Despite monolithic authority to the contrary, the appeals court in this case created a misalignment defense and misconstrued the evidence and conduct of the trial judge to support its flawed conclusion. *Maldonado v. Missouri Pacific Ry. Co.*, 798 F.2d 764 (5th Cir. 1986), relied upon by the court below, did not conclude that a defense of drawbar misalignment was viable. On the contrary, *Maldonado* specifically declined to decide the issue that the court concludes it resolved. In this regard, the *Maldonado* court stated:

> Therefore, we do not have to decide whether Missouri Pacific, with appropriate evidence could have raised the defense of misalignment, because Missouri Pacific did not produce any evidence that would sustain an instruction on such a defense.

Maldonado specifically affirmed the charge of the district court that it is a violation of the FSAA "for the railroad to operate a car which has a drawbar sufficiently out of line that it does not couple on impact." The *Maldonado* court opined further that *if* a defense of misalignment existed it could only be applied if the misalignment were not due to a failure in the operation of the drawbar or a defective condition of the equipment, and that the burden of proving this was upon the railroad.

The respondent here did not produce an iota of evidence on this issue nor could it have. The question of movement of the

drawbar necessary to accommodate curves is not an issue when the cars are on a straightaway as here. *Atlantic City R. Co. v. Parker,* 242 U.S. 56 (1916). Nor can one argue that normal movement of the cars may cause a drawbar to move off center, thereby satisfying the burden that misalignment was not caused by equipment failure. In *Clark v. Kentucky & Indiana Terminal Railroad*, 728 F.2d 307 (6th Cir. 1974) this was clearly explained:

> A coupler typically has a lateral play of one to one and one-half inches on either side that permits movement of coupled cars around curves. But a coupler's lateral motion may be increased by wear. *Hallada v. Great Northern Ry.*, 244 Minn. 81, 69 N.W.2d 673, 680, *cert. denied*, 350 U.S. 874, 76 S.Ct. 119, 100 L.Ed. 773 (1955). "[T]he customary play of an inch or a little more does not interfere with . . . coupling upon impact." *Hampton v. Des Moines & Cent. I. R. Co.*, 65 F.2d at 900. But "[i]f the couplers are out of alignment beyond the normal play, the coupling will not make automatically even though both knuckles are opened." *Chicago St. P. M. & O. Ry. Co. v. Muldowney,* 130 F.2d at 974-75.

Assuming *arguendo* the viability of a broader application of *Maldonado*, there was absolutely no evidence in the case at bar that the failure to couple was for some reason other than equipment failure. Of course, a court should not charge on an issue where there is no evidence to support the charge. Evidence as to other cars on other tracks could not possibly afford a "*Maldonado* charge" as to the failure of the cars to couple in the instant case.

Laudenslager, the witness whose testimony was the subject of the court's ruling to reverse, was Reed's co-worker. He aligned the

drawbar on the car that ran over Reed's foot. During his cross-examination, defense counsel read a short portion of his testimony at a former trial. The section of testimony asked whether Laudenslager "*ever* experienced cars not coupling even though aligned." Clearly, this testimony did not relate at all to the car involved in Reed's case. Nor did the question deal with the condition of the couplers in Reed's case, nor with the condition of the couplers of the cars Laudenslager was referring to, *i.e.*, whether or not they were defective. Nor did the question deal with whether the cars were on a curve or a straightaway. The answer "Oh, yes" that appeared in the transcript was not read to the jury during the examination of Laudenslager, nor was the transcript introduced into evidence. Plainly, the answer "Oh, yes" was not in evidence.

During his closing to the jury, counsel for the railroad attempted to read the "Oh, yes" to the jury. On objection, the judge ruled that the portion not read during trial could not be read during closing. The court further advised counsel that he could argue anything that "took place before the jury." The appellate court reversed because the trial judge accurately stated "I don't think you read that into the record here. So I don't think it's in evidence." The appellate court gratuitously and incorrectly assumed that the trial court was mistaken because the testimony — other than the two words — had been read to the jury. The trial court ruled on the precise issue presented by the objection — that the two words were not in evidence.

It is not the function of an appellate court to speculate on the thought process of a trial judge in order to take a case away from a jury on the theory that the trial judge did not mean what he plainly stated. Nor did this testimony deal "with a critical aspect of the railroad's misalignment defense." Nothing prohibited by the trial court's ruling could have supplied the deficiency in the railroad's proof. *Maldonado* did not rule that misalignment alone was a defense. On the contrary, the railroad had the burden of

establishing that misalignment of the drawbar in question did not result from equipment failure or defect. The ruling of the district court had no bearing on this issue and was well within the discretion of the trial judge. *Smith v. Danyo*, 585 F.2d 83 (3d Cir. 1978); *Field v. Omaha Standard Indus. Inc.*, 582 F. Supp. 323 (E.D.Pa. 1983), *aff'd*, 732 F.2d 145 (3d Cir. 1984); *Pearce v. Cornerstone Clinic for Women*, 938 F.2d 855 (8th Cir. 1991).

III.

GRANTING A NEW TRIAL BECAUSE OF ALLEGED ERROR ON ONE THEORY OF LIABILITY WHEN THERE WAS NO ERROR ON A TOTALLY DIFFERENT THEORY OF LIABILITY THAT ALONE SUSTAINED THE VERDICT, VIOLATED PETITIONER'S SEVENTH AMENDMENT RIGHT TO TRIAL BY JURY.

This case was submitted to the jury on two distinct violations of the FSAA: the failure of the cars to couple on impact, and the defective cutting lever that caused Reed to go between the cars to open the knuckle so as to prepare the cars to couple upon impact. The court found no error in that portion of the trial dealing with the defective cutting lever, but concluded there was error as to that aspect of the case dealing with the failure of the cars to couple on impact. The court reasoned it was, therefore, obligated to reverse the jury and order a new trial.

In *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 446 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978) the same court previously observed, in reversing a district court's grant of a new trial, that to the extent new trials are granted the judge takes over, if he does not in fact usurp the prime function of the jury as the trier of facts — an action that "effects a denigration of the jury system." *Lind v. Schenley Industries, Inc.*, 278 F.2d 79, 90 (3d Cir. 1960) (en

banc), *cert. denied*, 364 U.S. 835 (1960). In the interest of preserving the Seventh Amendment right to trial by jury, there exists the general rule that a court should reconcile the jury's verdict, if at all possible. Thus, in *Gallick v. Baltimore & Ohio R. Co.*, 372 U.S. 108 at 119 (1963), this Court held:

> "Where there is a view of the case that makes the jury's answer to special interrogatories consistent, they must be resolved that way." *Atlantic & Gulf Stevedores v. Ellerman Lines, Ltd.*, 369 U.S. 355, 364, 7 L.Ed.2d 798, 807. We therefore must attempt to reconcile the jury's findings by exegesis if necessary, as in *Arnold v. Panhandle & S.F. R. Co.*, 353 U.S. 360, 1 L.Ed.2d 889; *McVey v. Phillips Petroleum Co.*, 288 F.2d 53 (CA 5th Cir.); *Morris v. Pennsylvania R. Co.*, 187 F.2d 837 (CA 2d Cir) (collecting authorities before we are free to disregard the jury's special verdict and remand the case for a new trial.

See also, Morgan v. Consolidated Rail Corp., 509 F. Supp. 281 (S.D.N.Y. 1980) at 284; *Henry v. A/S Ocean*, 512 F.2d 880 (2d Cir. 1948).

In the instant case, the scrap car came off the scale, hit the boxcar that was already stopped on the track, and bounced approximately ten feet away from the boxcar. Reed waited a discernible period of time to make sure the scrap car would not move. He then attempted to open the coupler on the scrap car by pulling on the cutting lever. After several pulls, it was determined that the cutting lever was defective. Only then did Reed go between the cars. It was while he was between the cars, because of the defective cutting lever, that the scrap car rolled, causing his injury.

While the failure of the cars to couple may have set the stage, it

was the defective cutting lever that caused him to go between the cars. Were the cutting lever operative, Reed would not have gone between the cars. Therefore, it was the defective cutting lever that was the proximate cause of petitioner's injury.

Against this factual backdrop, reversible error on the failure to couple theory should not have precluded the court from sustaining the verdict on the cutting lever theory, which the court found to be "the error-free count." This is especially true where the verdict in favor of Reed would, of necessity, have required the jury to conclude that the cutting lever was defective.

The efficient administration of justice should sanction this result. The jury was sworn to make the determination of fault. The appeals court, apparently unhappy with the result, searched the record for a basis to take away the conclusions of the jury. It achieved this goal by incorrectly assuming the mental process of the trial judge, who precluded the inappropriate reading by defense counsel of two words — "Oh, yes" — which two words were of no factual or legal relevance to the issue. Unfortunately, the ruling reveals more about the appellate judge's state of mind than about that of the trial judge or the jury. This invasion of Reed's right to trial by jury cannot be allowed to stand. In *Sentilles v. Inter-Caribbean Shipping Corp.*, 361 U.S. 107, 4 L. Ed. 2d 142 (1959) at 110, this Court in similar circumstances stated:

> Though this case involves a medical issue, it is no exception to the admonition that, "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or

> conclusion drawn by the jury . . . . The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable . . . . Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable." *Tennant v. Peoria & P. U. R. Co.*, 321 U.S. 29, 35, 88 L. Ed. 520, 525, 64 S. Ct. 409, 15 NCCA NS 647. The proofs here justified with reason the conclusion of the jury that the accident caused the petitioner's serious subsequent illness. *See Rogers v. Missouri Pacific R. Co.*, 352 U.D. 500, L. Ed. 2d 493, 77 S. Ct. 443. Reversed.

What is more, the railroad cannot be heard to complain as it effectively waived any claim of error by failing to object to the court's instructions, or to the form of verdict which invited the jury to find as it did. *See Lopez v. Oldendorf*, 545 F.2d 836, 839 (2d Cir. 1976), *cert. denied*, 431 F.2d 988 (1977); *Rubin v. United States*, 380 F. Supp. 1176 (W.D.Pa. 1974), *aff'd mem.*, 515 F.2d 507 (3d Cir. 1975); *Morgan v. Consolidated Rail Corp.*, 507 F. Supp. 281 (S.D.N.Y. 1980).

CONCLUSION

For these reasons, it is respectfully submitted that this petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit should be granted.

Respectfully submitted,

MARVIN I. BARISH
LAW OFFICES OF
MARVIN I. BARISH, P.C.
Attorney for Petitioner
Suite 801, The Curtis Center
Sixth & Walnut Streets
Philadelphia, Pennsylvania 19106
(215) 923-8900

APPENDIX A — SUR PETITION FOR REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED NOVEMBER 18, 1992

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-1067

PHILADELPHIA, BETHLEHEM & NEW ENGLAND RAILROAD COMPANY,

Appellant

v.

CHARLES N. REED,

Appellee

Appeal from the United States District Court for the Eastern District of Pennsylvania (D.C. Civil Docket No. 87-04763)

SUR PETITION FOR REHEARING

PRESENT: SLOVITER, *Chief Judge*, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS and WEIS, *Circuit Judges*

The petition for rehearing filed by appellee in the above captioned matter having been submitted to the judges who

---

* Hon. Joseph F. Weis, Jr., Senior Circuit Judge of the United States Court of Appeals for the Third Circuit, was limited to voting for panel rehearing.

participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

s/ William D. Hutchinson
Circuit Judge

DATED: NOV 18 1992

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED OCTOBER 29, 1992

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-1067

PHILADELPHIA, BETHLEHEM & NEW ENGLAND RAILROAD COMPANY,

Appellant

v.

CHARLES N. REED,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(D.C. Civ. No. 87-04763)

Argued August 18, 1992

Before: HUTCHINSON, COWEN, and WEIS, *Circuit Judges*

Filed OCT191992

Steven B. Feirson, Esquire (ARGUED)
Norbert F. Bergholtz, Esquire
Frank J. O'Hara
Michael F. R. Harris
Dechert Price & Rhoads
4000 Bell Atlantic Tower

Appendix B

1717 Arch Street
Philadelphia, PA 19103-2793

Attorneys for Appellant

Marvin I. Barish, Esquire (ARGUED)
Marvin I. Barish Law Offices, P.C.
Suite 801, The Curtis Center
Sixth & Walnut Streets
Philadelphia, PA 19106

Attorneys for Appellee

OPINION OF THE COURT

WEIS, *Circuit Judge*.

This is the second time this case has come before us. We granted a new trial on the first appeal and explained our reasoning in a published opinion. *Reed v. Philadelphia Bethlehem & New England R.R. Co.*, 939 F.2d 128 (3d Cir. 1991). Because the pertinent facts are set out in the some detail there, we will not repeat them at length here. It suffices to note that the plaintiff, a crewman for the railroad, was injured by a scrap car which rolled over his foot when he went between the railroad cars to open the coupling knuckle. The plaintiff had undertaken this task after the scrap car had failed to couple with the car in front of it.

At the second trial, the jury found that the railroad had violated the Safety Appliance Act and awarded damages to the plaintiff. The district court denied the defendant's motion for a new trial on the ground that local rule 20(c) required that a brief be filed contemporaneously with the motion. Before the railroad could

explain that it had ordered the transcript necessary for preparation of a brief, the court dismissed the motion.

In explaining its action, the district court stated that a new filing (apparently accompanied by a brief to comply with the local rule) would violate the ten day limitation of Rule 59(b) of the Federal Rules of Civil Procedure. Rule 59(b) only requires that the motion for a new trial be served within ten days after entry of the judgment, thus the fact that a brief was not filed contemporaneously has no effect on the validity of that motion. A district court custom or local rule that sets the time when briefs may be filed has no bearing on the time limitation for service of the motion itself.

It appears that, in this case, the transcript of the trial proceedings was essential for the preparation of post-trial briefs. It would have been better had the parties been given time to secure the transcript. In these circumstances, the district court erred in failing to consider the railroad's motion for a new trial. In any event, the district court did comment on some of the issues raised in the railroad's motion, a practice that we commend.

In this appeal, defendant contends that the trial court committed a series of procedural and evidentiary errors which substantially prejudiced the defense. We conclude that the cumulative effect of some of those errors requires the grant of yet another new trial.

The court submitted two distinct claims to the jury — one directed to an alleged defect in the cutting lever, and the other focusing on the allesed failure of the coupling mechanism. The jury found that the Safety Appliance Act had been violated. That general finding, however, did not specify whether liability was based on the first or second claim, or on a combination of both.

Appendix B

When a jury's finding may be based on one of two theories, one of which is tainted by reversible error and the other which is not, the judgment must be set aside when it is impossible to determine which route the jury followed. The remedy is a new trial. *See Carden v. Westinghouse Elec.*, 850 F.2d 996, 1000 (3d Cir. 1988); *Avins v. White*, 627 F.2d 637, 646 (3d Cir. 1980). Accordingly, finding reversible error on one of the plaintiff's theories, we must reject his contention that the verdict can be sustained on the error-free count.

In our previous opinion, we discussed the provisions of the Safety Appliance Act requiring automatic coupling devices. We rejected the contention that a "mere failure to couple establishes a per se violation." *Reed*, 939 F.2d at 132. The plaintiff may establish a prima facie case by showing a failure to couple, and thereby shift the burden to the railroad to establish a separate cause for the mechanism's failure to operate properly other than equipment failure. One such cause — the one presented by the railroad — is misalignment of the drawbars caused by human error, vibration, or jarring.

During his closing remarks to the jury, defense counsel began to read from the deposition of witness Laudenslager that had been used during his cross-examination. This testimony related to Laudenslager's experiences with misalignments caused by jarring of a car in motion. Plaintiff's counsel objected, apparently to the injection of two words "oh yes," which were not read during Laudenslager's cross-examination. The court sustained the objection, but apparently misconstrued it as going to all of the deposition testimony. The court said in the jury's hearing, "I don't think you read that into the record here . . . . So, I don't think it's in evidence . . . . continue with your closing, but don't refer to that deposition, that testimony . . . ."

Appendix B

A review of the transcript establishes that the trial judge was honestly mistaken because the testimony, other than the two words had, in fact, been read to the witness in the presence of the jury. The two omitted words, in context, were not significant but the deposition was a critical aspect of the railroad's misalignment defense. Prohibition of argument on this evidence and the trial judge's statement that the testimony was not in the record were prejudicial to the defense. *See Enercomp Inc. v. McCorhill Publishing Co.*, 873 F.2d 536, 544-45 (2d Cir. 1989); *Bennett v. Allstate Ins.*, 889 F.2d 776, 780 (8th Cir. 1989); *American Home Assurance v. Sunshine Supermarket*, 753 F.2d 321, 327 (3d Cir. 1985). In the circumstances, we cannot consider the error harmless, albeit inadvertent.

Another prejudicial comment by the court on the misalignment defense occurred during the instruction to the jury. During the trial, the railroad introduced evidence showing that the coupler functioned properly when tested in the investigation shortly after the accident occurred. In his charge, the district judge said, "it is not relevant whether the coupler mechanism functioned properly before or after the accident in question."

That instruction was correct insofar as it would apply to the plaintiff's prime facie case. The evidence that the coupling equipment was functioning properly immediately after the accident, however, was clearly relevant to the railroad's misalignment defense. *Lewis v. Baker*, 526 F.2d 470, 474 (2d Cir. 1975) (condition of brake on railroad car after accident was relevant). Evidence of proper operation immediately after the accident tended to show that Laudenslager's more general observations about misalignment had particular application to this incident. In that context, the statement by the district court about the post-inspection report was not harmless.

Appendix B

Plaintiff argues that the railroad did not properly take exception to this portion of the charge and, thus, waived any objection. The railroad relies on the fact that, in the second trial, the court and parties relied extensively on the charge and objections from the first trial and, therefore, contends that Rule 51 of the Federal Rules of Civil Procedure should not be stringently applied here.

The plaintiff's argument has merit, but does not bar review at this juncture. The purpose of Rule 51 is to give the trial judge an opportunity to correct misstatements in the charge before the jury retires. Had a specific objection been made calling the court's attention to the difference between the application of the evidence to the plaintiff's prime facie case and the misalignment defense, the court might have made the distinction between those two points. However, the district court did grant a blanket exception "to the extent that I overruled either of your requests." In light of that ruling, the fact that we are reversing on other grounds, and the possibility that review may avoid error in retrial, we have considered and agree with the defendant's objection to this aspect of the charge.

Defendant also complains that the jury was permitted to consider the "intent of Congress" in enacting the Safety Appliance Act. This asserted error takes several forms. First, the trial judge made the following preliminary remarks to the jury regarding the intent and purpose of the Act:

> "[I]n the early days of railroading, crewmen suffered many injuries when they stepped between cars to separate the coupling devices then in use. Taking notice of the harm caused by defective and inadequate equipment,

requires railroads to use automatic coupling devices."

The jury also heard the plaintiff's expert witness, Wallace C. Holl, testify about the congressional intent underlying the Act. Plaintiff called Holl as an expert witness on railroad safety and the Safety Appliance Act. Holl is a former employee of the Federal Railway Administration and is not a lawyer. He opined that the "intent is to eliminate the hazard of having men get between the ends of cars in the coupling and uncoupling of those cars." He also contended that the situation where "opening the knuckle could only be done by entering between the ends of the cars, is very definitively a violation of Section 2." In addition, Mr. Holl testified that he had "no doubt" that the defendant's violations of the Act caused the plaintiff's injury. When defense counsel objected to Holl's testimony, the trial judge said in the presence of the jury: "Oh, I think this man is eminently qualified to opine on the Safety Appliance Act. I think we will all benefit from his testimony."

In assessing the propriety of both the judge's preliminary remarks and Mr. Holl's testimony about the intent of the Safety Appliance Act, we begin with the basic proposition that the trial judge is charged with the responsibility of instructing the jury on the law applicable to a case. Although Rule 704(a) of the Federal Rules of Evidence allows a witness to express an opinion on the ultimate issues submitted to the jury, the rule does not permit a lay person to instruct a jury on the law. As we stated in *United States v. Leo*, 941 F.2d 181, 196 (3d Cir. 1991), "it is not permissible for a witness to testify as to the governing law since it is the district court's duty to explain the law to the jury." *See also Hyah v. Jacobs*, 961 F.2d 359, 364 (2d Cir. 1992) ("Expert . . . is not qualified to compete with the judge in the function of instructing the jury").

Appendix B

It requires no great mental leap to conclude that the use of automatic couplers would reduce the number of occasions that crewmen would have to go between the cars, and that Congress had that in mind when it passed the Safety Appliance Act. The difficulty here arises from the fact that testimony on congressional intent could lead the jury to believe that requiring crewmen to go between the cars — for any reason —constitutes a per se violation of the Act.

This very point was the subject of extended discussion in *United Transp. Union v. Lewis*, 711 F.2d 233 (D.C. 1983), a case cited by us in our previous opinion. The *Lewis* court posed the question on congressional intent as "whether the [statutory] words, without the necessity of men going between the ends of the cars, (1) merely describe the requisite automatic equipment or (2) whether they also impose an independent prohibition against the act of going between the ends of the cars during uncoupling operations." *Id.* at 243. The Court held that the controverted phrase specified the "kind of coupling equipment that will pass statutory muster." *Id.*

Rejecting a more expansive reading that was adopted in an earlier interpretation by the Federal Railway Administration, the Court said, "[n]othing in the plain language suggests an intent to impose an independent prohibition against procedures that require men to go between cars." *Id.* Indeed, as the Court pointed out, "[i]n the last step of the coupling process, men must go between the rails to couple hoses for the air brakes." *Id.* at 245. In a footnote, the Court added that a broad construction would make even the "use of the cut-lever a technical violation of the Act, since . . . a switchman must place his hand between cars to operate the cut-lever, the end of which does not extend beyond the side of the car and is thus between the cars." *Id.* 245 n.33.

Appendix B

The *Lewis* opinion is an authoritative interpretation of the statute and is to some extent inconsistent with Holl's testimony. This situation illustrates why a witness is not permitted to expound on the law applicable to a case such as the one here. We conclude that Holl's testimony on the law was inadmissible and beyond the scope of Federal Rule of Evidence 704(a). Its admission was erroneous.

The trial judge's brief comment on the intent of Congress would have been better left unsaid because it enabled plaintiff's counsel to argue, as he did, that the railroad was required to keep men from going between the cars. Although a court may use history as an aid in constructing a statute, it is for the judge and not the jury to determine the meaning of legislation. Consequently, there is no need for the jury to have been instructed on the history of and intent behind the statute. To the extent that the reference might have confused the jury, the error may not have been harmless. On retrial, we suggest that court and counsel all refrain from discussing the intent of Congress.

The cumulative effect of the errors discussed was to deny a fair trial to the defendant and we therefore must remand for retrial.

TO THE CLERK:

Please file the foregoing Opinion.

s/ illegible
Circuit Judge

APPENDIX C — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED OCTOBER 19, 1992

No. 92-1067

PHILADELPHIA, BETHLEHEM & NEW ENGLAND RAILROAD COMPANY,

Appellant

v.

CHARLES N. REED,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(D.C. Civ. No. 87-04763)

Present: Hutchinson, Cowen, and Weis, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel August 18, 1992.

On consideration whereof, it is now here ordered and adjudged by the Court that the cause is remanded to the District Court for retrial. All of the above in accordance with the opinion opf this Court.

ATTEST:

s/ Sally Mrvos
Clerk

Dated: October 19, 1992

Appendix C

Certified as a true copy and issued in lieu
of a formal mandate on November 27, 1992.

Test: s/ illegible

Acting Chief Deputy Clerk, U.S. Court of Appeals for the Third Circuit.

APPENDIX D — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA FILED JANUARY 22, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 87-4763

January 21, 1992

CHARLES N. REED

v.

PHILADELPHIA, BETHLEHEM & NEW ENGLAND RAILROAD COMPANY

Dalzell, J.

MEMORANDUM

Before us are two post-trial motions, following the entry of a judgment in favor of plaintiff, and against the defendant, in the amount of $563,275.22 after a jury verdict. Defendant Philadelphia, Bethlehem & New England Railroad Company (hereinafter referred to as the "Railroad") has filed a motion for new trial or remittitur, and plaintiff, Charles N. Reed, has moved to dismiss defendant's motion for failure to comply with Local Rule

dismiss for lack of prosecution. For the reasons stated below, we will grant plaintiff's motion to dismiss. Alternatively, we will deny the Railroad's motion for new trial.

BACKGROUND

Mr. Reed was a freight conductor who worked for the Railroad and who on May 7, 1986 had most of his right foot amputated when a box car failed to couple in the freight yard and rolled back over his foot. Mr. Reed filed suit under the Federal Safety Appliance Act and the Federal Employers' Liability Act, but proceeded to trial solely on the former statute, 45 U.S.C. § 2.

The first trial resulted in a defense verdict, but on July 31, 1991, a unanimous panel of the Court of Appeals reversed, *Reed v. Philadelphia. Bethlehem & New England Railroad Company*, 939 F.2d 128 (3rd Cir. 1991). In his opinion for the panel, Judge Weis held that defense counsel's closing argument was improper because he was permitted, over objection, to tell the jury that Mr. Reed "is being provided disability through a federal system and by the company and we have not been callous or disregard [sic] of Mr. Reed's welfare or his years of service with the company." The Court of Appeals concluded that this statement was in direct violation of the collateral source rule ordained by the United States Supreme Court in cases such as *Tipton v. Socony Mobil Oil Co. Inc.*, 375 U.S. 34 (1963) and *Eichel v. New York Central R.R. Co.*, 375 U.S. 253 (1963). The judgment was, therefore, vacated and the matter was remanded for a new trial.

On its reassignment, therefore, we had the benefit of the Court of Appeals' detailed canvass of the law applicable to this case. We also had the advantage of the transcripts of the first trial before another judge. It is worth noting that over five years had elapsed from the time of Mr. Reed's injury to the time the mandate issued.

from the time of Mr. Reed's injury to the time the mandate issued.

After four days of testimony, the jury reached its verdict late the evening of December 12, 1991 in the amount of $570,514.64. By virtue of a stipulation between counsel, we molded the verdict in the $563,275.22 amount of the judgment the next day. On December 27, 1991, the Railroad filed a motion for new trial or remittitur; the motion was not uncontested.

~~LEGAL~~ ANALYSIS

The plaintiff has filed a motion to dismiss the Railroad's motion for new trial or remittitur because of the Railroad's failure to comply with Local Rule 20(c), which provides, in relevant part:

> Every motion not certified as uncontested shall be accompanied by a brief containing a concise statement of the legal contentions and authorities relied upon in support of the motion.

The Railroad did not file any brief in support of its motion, nor did it seek leave of court to file a brief after the ten-day period for doing so had expired.

It is well-settled in this District that Local Rule 20(c)'s briefing requirement is mandatory, and the failure to comply with it requires denial of the motion for new trial here. For example, in *Field v. Omaha Standard Inc.*, 582 F.Supp. 323 (E.D.Pa. 1983), *aff'd without op.*, 732 F.2d 145 (3d Cir. 1984), *cert. denied*, 469 U.S. 828 (1984), after a jury verdict for the defendant, plaintiff moved for a judgment n.o.v. or a new trial raising twenty-eight separate grounds. Of these, twenty-one were not briefed in conformity with Rule 20(c). Judge Bechtle wrote:

Appendix D

> Plaintiff moved for judgment n.o.v. or for a new trial raising 28 separate grounds. Of these, 21 are not briefed, and are stated in merely general terms. In view of this, the Court has re-examined its previous rulings and is not persuaded that those rulings on these non-briefed points should be changed. Accordingly, it shall dismiss all non-briefed points of error for lack of prosecution in addition to lack of merit. *See* Local Rule 20(c); *Carl Walker & Associates, Inc. v. Dickerson Prestress. Inc.*, No. 75-2215, slip op. at 2 (E.D.Pa. Dec. 8, 1982).

See also Amader v. Pittsburgh Corning Corp., 546 F.Supp. 1033 (E.D. Pa. 1982); *Shoemaker v. Allender*, 520 F.Supp. 266, 271 (E.D.Pa. 1981); *United States v. Schuk*, 565 F.Supp. 613, 615 (E.D.Pa. 1983).

Of course, a district court is without power to enlarge the ten day filing requirement of F.R.Civ.P. 59(b). *See also* 11 Wright & Miller, *Federal Practice and Procedure* § 2812 at 83 (1973). Since the Railroad's motion was not filed in conformity with Local Rule 20(c), that failure cannot be corrected by a new filing now because to do so would be a *de facto* enlargement of the Rule 59(b) time limit that district courts are powerless to enlarge. Accordingly, plaintiff's motion to dismiss the Railroad's motion must be granted.

Alternatively, we have considered the headings, and brief descriptions, of the contentions made in the Railroad's motion for new trial, and find them to be without merit. Three of the Railroad's objections deserve particular, if not extended, mention.

Appendix D

First, from the moment this case was received on remand from the Court of Appeals, the Railroad, through its counsel, made it clear that, notwithstanding its misfortune in the Court of Appeals on this point, the Railroad intended to use this case as a vehicle to achieve the burial of the collateral source rule. Having heard this chant rehearsed in the pretrial proceedings, at the charge conference we decided that, in order to avoid a *third* trial, it would make sense, in the special verdict form submitted to the jury, to split out the compensatory elements of damages —and, therefore, those that would be subject to a repudiation of the collateral source rule — from Mr. Reed's damages for pain and suffering and other elements of loss. In its answers, the jury duly inserted different sums for each of the five categories set forth in the special interrogatory form.

The Railroad claims that it was error to make this division of the elements of damages. Under the circumstances of this case, the Railroad's position has to be regarded as staking out a new frontier of unembarrassed advocacy. The very reason for making the breakout of damages was because the Railroad left no doubt tnat it will seek review in the United States Supreme Court to end the perceived unfairness of the collateral source rule. In the event the Railroad is successful, the special verdict form does nothing more than enable a reviewing court, or this court, to mold the verdict to comply with any such change in the law. In essence, therefore, the Railroad's complaint is that we took it seriously when we shaped the damages portion of the special verdict form.[1]

---

1. While the Railroad is entitled to use this case as a playing field for winning legal reform to its advantage, we are most mindful that Mr. Reed is 66 years old and that his injury happened almost six years ago. The Railroad is, at least in legal theory, immortal.

Railroad's complaint is that we took it seriously when we shaped the damages portion of the special verdict form.[1]

Second, and with apparently equal seriousness, the Railroad takes exception to a brief mention, in the preliminary instructions to the jury, of the nature of the Safety Appliance Act. In reviewing the transcript of the first trial, we noticed that there was incessant argument and waste of time over plaintiff's counsel's mention of, or even passing allusion to, the purpose of the Safety Appliance Act. In order to avoid this tiresome debate, we advised both counsel in advance of trial that we would make a brief mention of the purpose of the Act, drawn from the Court of Appeals' opinion in this very case. This we did, though taking the liberty of toning down one locution in the selected paragraph of the panel's opinion to which the Railroad might have legitimately taken exception if read unamended to the jury.[2]

A review of the transcript of the four-day trial will reveal that this simple device avoided the tedious jabbing on this point that marred the first trial. Additionally, it had the advantage of giving the jury a very modest preview of what was described at much greater length in the jury charge.[3]

---

2. In the Court of Appeals opinion, Judge Weis wrote, at page 6 of the slip opinion, "In the early days of railroading, crewmen suffered an alarming number of injuries when forced to step between cars. . . ." which we modified to read, "In the early days of railroading, crewmen suffered many injuries when forced to step between cars. . . ."

3. It is worth noting in passing that the *Bench Book for United States District Court Judges* (Federal Judicial Center, 3d ed. 1986), at § 2.04-3, recommends a summary of applicable law in preliminary jury instructions.

Appendix D

The plaintiff's witnesses were consistently forthright and persuasive. By contrast, the Railroad's witnesses, most notably Mr. Gartland but also others, were evasive and, apparently, the jury chose not to credit their testimony. It seems fair to suggest that plaintiff presented the paradigmatic Safety Appliance Act case, and the jury's verdict was, therefore, entirely appropriate and supported by the great weight of the evidence.

We have considered the Railroad's other contentions, and find them, as noted above, not well-founded.

An order follows.

Appendix D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 87-4763

CHARLES N. REED

-v-

PHILADELPHIA, BETHLEHEM & NEW ENGLAND
RAILROAD COMPANY

ORDER

AND NOW, this 21st day of January, 1992, upon consideration of defendant's motion for new trial or remittitur, and plaintiff's motion to dismiss defendants motion for new trial, for the reasons set forth in the foregoing Memorandum, it is ORDERED that defendant's motion is DENIED and plaintiff's motion is GRANTED.

BY THE COURT:

s/ Stewart Dalzell
Stewart Dalzell, J.